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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 LONG PLAYER L.P.,

4 Plaintiff,

5 v.

18 CV 2414 (LGS)

6 GOLD MAIDEN, LLC, et al.,

7 Defendants.

8 -----x

9 New York, N.Y.
March 29, 2018
11:30 a.m.

10 Before:

11 HON. LORNA G. SCHOFIELD,

12 District Judge

13 APPEARANCES

14 PETER J. REID

15 Attorney for Plaintiff

16 WACHTEL & MISSRY, LLP

Attorneys for Defendants

17 BY: STEVEN J. COHEN

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1 THE DEPUTY CLERK: Long Player LP v. Gold Maiden, LLC,
2 et al. Counsel, please state your name for the record.

3 MR. REID: My name is Pete Reid, I'm counsel for
4 plaintiffs.

5 MR. COHEN: Good morning. Steven Cohen, Wachtel &
6 Missry for the defendants.

7 THE COURT: Good morning, everyone. You may be
8 seated.

9 So, first of all, thank you for your papers and I know
10 it was a short deadline, so I appreciate that. And I have
11 looked at them and I thought where I would begin, since I have
12 some familiarity with the plaintiff's position from having
13 issued the TRO, I thought I would hear from Mr. Cohen.

14 And although I think I may understand some things, I
15 am not entirely sure that I do. So I thought, first of all, it
16 would be helpful for you to describe for me the nature of the
17 business. I understand what the structure is, who the parties
18 are and what their various entities are, but I don't know what
19 this business does.

20 So, if you could explain that, that I think is
21 important background.

22 MR. COHEN: Sure, your Honor. I would be happy to.
23 The business of Blueprint is that of creating an affiliate
24 network which matches a network --

25 THE COURT: A what network?

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1 MR. COHEN: An affiliate network. Which matches a
2 network of publishers with a network of advertisers.

3 THE COURT: All right.

4 MR. COHEN: And Blueprint is the facilitator for those
5 two to match.

6 THE COURT: Okay.

7 MR. COHEN: In this day and age, when your Honor would
8 go on a computer at night and sometimes you would get in your
9 inbox some invitations from, let's say, I have the example in
10 my papers of AIG Insurance. That would be an attempt by AIG to
11 get eyeballs on its website for a consumer who may be
12 interested in purchasing an insurance product. And the behind
13 the scenes to get to the point where that AIG solicitation is
14 sent to a computer user --

15 THE COURT: Sir, are you talking about banners?

16 MR. COHEN: It could be banners, it could be social
17 media, it could be a Facebook page, it could be an e-mail
18 blast.

19 THE COURT: So we're not talking about advertising in
20 the traditional sense that would appear on, say, you know,
21 Yahoo News on the side.

22 MR. COHEN: I'm sorry. Advertising in the
23 traditional -- I didn't hear.

24 THE COURT: This is not advertising -- I forget what
25 the terminology is. This isn't traditional advertising in the

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1 sense that it appears on the publication page, even if it is an
2 online page. This is advertising in the sense of reaching out
3 to consumers.

4 MR. COHEN: Correct.

5 THE COURT: Digitally somehow.

6 MR. COHEN: Exactly.

7 THE COURT: Okay.

8 MR. COHEN: And the way the business works is that the
9 owners of a network such as Blueprint make it their business to
10 bring in advertisers and to bring in publishers who are in the
11 business of selling products for the advertisers through this
12 exchange.

13 THE COURT: So, I get what the advertisers are. They
14 are companies like AIG, companies with products to sell or
15 services. But, what are the publishers? We're not talking
16 about The New York Times, are we?

17 MR. COHEN: Not talking about The New York Times.
18 We're talking about those businesses which can do marketing,
19 basically.

20 THE COURT: That do what? Can you speak into the mic?

21 MR. COHEN: Do marketing in essence through the
22 internet for the owners of the brands.

23 THE COURT: So they're basically internet marketing
24 companies.

25 MR. COHEN: In a very general sense, correct.

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1 THE COURT: All right.

2 MR. COHEN: So, what's happened here is that this was
3 a business which was founded in or about 2010, and my clients
4 Mr. Soussan, who is in the courtroom behind us, lives in New
5 York.

6 THE COURT: Hello. Thank you for coming.

7 MR. COHEN: And Mr. Vahdat, who lives in California,
8 formed this company with the plaintiff Mr. Goyer to develop
9 this alliance network to create this type of business. And
10 Mr. Goyer had the background in publishing, he had his own
11 entity called Hockey Bird. You may have seen that reference in
12 the papers.

13 THE COURT: I did.

14 MR. COHEN: He was tasked with driving publishers to
15 the Blueprint network.

16 THE COURT: So, driving publishers or driving Hockey
17 Bird?

18 MR. COHEN: Hockey Bird was an example of a publisher.

19 THE COURT: Was his job exclusively to put together
20 business between Blueprint and Hockey Bird or were there other
21 publishers that he was working with?

22 MR. COHEN: Well, the idea was to bring additional
23 publishers to Blueprint and that was his primary focus. Part
24 of the problem is he failed. And then he went silent in or
25 about late 2013 or 2014.

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1 THE COURT: So tell me about the flow of funds in this
2 business.

3 MR. COHEN: The flow of funds is the publisher would
4 send money, moneys to the -- I'm sorry. Give me one minute,
5 your Honor.

6 THE COURT: The advertisers would send money.

7 MR. COHEN: The advertisers would send money to the
8 network. The alliance in this case which would be Blueprint.
9 Blueprint would retain its agreed-upon margin for bringing the
10 two parties together, and the balance of the moneys would be
11 sent out to the publisher. You got Hockey Bird which received
12 over \$6 million from Blueprint over the course of this past
13 several years, or more recently Souvah, which is the entity
14 which is a defendant here, which we all know about.

15 The flow of funds was into the network, and then the
16 lion's share of it, generally, for argument's sake, 80 percent
17 or more goes out to the publisher whereby the network,
18 Blueprint, would retain its commission or fee.

19 THE COURT: Just so it makes sense to me, can you
20 follow the money then from the publisher. So the publisher
21 then keeps the money and arranges for the advertising, the
22 banners or whatever they are to be -- it actually arranges for
23 the outreach or it has clients?

24 MR. COHEN: My understanding, your Honor, is the
25 advertiser, once it is connected with the consumer, deals

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1 directly with the consumer for the purchase itself.

2 THE COURT: I don't mean that. So the advertiser
3 says, here, I want you to do advertising for me. And so, the
4 publisher agrees to do that and what does the publisher do?
5 The publisher is getting the lion's share of this money. What
6 does the publisher do?

7 MR. COHEN: The publisher again is trying to connect
8 the advertiser to a product and then to an ultimate consumer.
9 It is a triangle. You need the consumer to have an action.
10 The action is a click onto the website or completing an
11 application or actually purchasing a product or service.

12 THE COURT: Right. And I'm not so concerned about the
13 ultimate transaction. I'm just concerned about the
14 advertising. The publisher actually has the job of doing the
15 outreach, of doing the marketing.

16 MR. COHEN: And tracking the, as I put in the papers,
17 the journey of the potential consumer. That's what the whole
18 what we refer to as the CAKE tracking platform does. It issues
19 reports, it shows those who log onto the platform, the journey
20 of that potential customer or consumer vis-a-vis the product,
21 and the advertiser and the publisher is doing all that through
22 the network facilitated by a Blueprint.

23 THE COURT: Got it. All right. So, now, I think I
24 understand from the declaration of Mr. Soussan in particular,
25 but explain to me then how what we just talked about fits in

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1 with the transactions that the plaintiff was complaining about,
2 for lack of a better word.

3 MR. COHEN: Sure. So the transaction plaintiffs
4 complain about are these payment by the network Blueprint to a
5 publisher Souvah from 2014 to the present.

6 THE COURT: Okay. So, they're basically the payments
7 that Blueprint made to the publisher Souvah when Souvah in some
8 sense took over the business of Hockey Bird because Hockey Bird
9 went away.

10 MR. COHEN: Yes.

11 THE COURT: More or less.

12 MR. COHEN: More or less.

13 THE COURT: Are there other publishers besides Souvah?

14 MR. COHEN: My understanding is there are some, but
15 Souvah is and has been for the past several years the principal
16 publisher for Blueprint.

17 THE COURT: To the extent there are payments being
18 made out of this bank account, you would expect most of them to
19 go to Souvah because Souvah is the primary publisher. Is that
20 right?

21 MR. COHEN: I'm reluctant to say "most," your Honor,
22 but I've done my best in a very short period of time to get up
23 to speed on this business.

24 THE COURT: You're doing a great job, so thank you.

25 MR. COHEN: So I think the point is, all this

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1 information has been available to the plaintiff throughout.

2 THE COURT: No, I understand that. But what I'm
3 trying to get to the bottom of is, is there something nefarious
4 going on here, or at least can the plaintiff sustain its
5 relatively high burden that something nefarious is going on?

6 MR. COHEN: No.

7 THE COURT: What you have done is you have presented a
8 very plausible explanation of what is going on here, and you
9 have submitted sworn testimony by two of the defendants
10 attesting to it in fairly specific terms. So, I think I'm
11 finished with you for the moment.

12 Let me then speak to Mr. Reid. So, the standard, as
13 you know, is quite high for a mandatory injunction. And the
14 standard in fact in the Second Circuit is that it is your
15 burden to show a clear or substantial likelihood of success on
16 the merits, which is higher than the usual standard for
17 preliminary injunctions.

18 So, given what we have heard and the sworn statements
19 of Mr. Soussan and Mr. Vahdat, my first question is, can we say
20 "never mind"? And if not, tell me why not.

21 MR. REID: To answer your first question, no. I'll
22 explain why not.

23 THE COURT: Can you speak into the mic, please.

24 MR. REID: I'm sorry. If I may have a go at trying to
25 explain this as well, because Mr. Cohen is new to this.

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1 Slightly newer than I am. He's doing a very good job of
2 explaining it.

3 I don't think of it as a triangle. There are your
4 advertisers and they're looking for someone to come to them.
5 It's done by a click. It could be a click on an advert on your
6 page. They are trying to get people to come to their website
7 or fill out some information, and they'll pay for people to do
8 that. To bring people to their website.

9 The middleman is this affiliate marketer, which is
10 what Blueprint does. Blueprint develops the software and
11 develops the code that tracks the clicks. So once these
12 adverts are published on different websites, that's what the
13 publisher does. They try to put it out there, you get it in
14 your e-mail box. If you get an ad saying two for one tickets
15 to the Yankees.

16 THE COURT: What we think of as spam normally,
17 unsolicited solicitations in your e-mail.

18 MR. REID: Some people have described it as that. So,
19 and people do click on these things. That's why they're sent.
20 So, some people like them, some people don't. But people do
21 click on them. And when they click on them, so the Yankees may
22 pay out a dollar for everyone that buys a ticket from the link
23 they sent out. The affiliate --

24 THE COURT: So, do they pay by the links or by the
25 clicks?

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1 MR. REID: Depends on the relationship.

2 THE COURT: On the deal, okay.

3 MR. REID: So the affiliate marketer will track that
4 whole process and will collect the money from the advertiser,
5 collect that dollar. Will retain 15, 20cents, 15 or 20 percent
6 for themselves, and disburse the rest to the publisher. That's
7 how the flow of the transaction works.

8 THE COURT: I got it.

9 MR. REID: One of the things Mr. Cohen said was that
10 my client was involved in publishing initially and he was then
11 tasked with developing a publishing arm for Blueprint. That's
12 what he was supposed to do. He tried to do it. It wasn't very
13 successful.

14 But part of what Blueprint did was not just the
15 marketing, but they did try to expand into the publishing. As
16 a justification for what they've done, the defendants have
17 said, well, we are going to try the publishing thing now.
18 Rather than do it through Blueprint, through the company, we
19 are going to set up our own company.

20 And the key difference between what Mr. Goyer did, was
21 that everybody knew about it. And the main sentence in their
22 affidavit, and I have to tip my hat off to them for admitting
23 this, is that they concede they did not seek or obtain my
24 client's consent. And that's why we can't just say no problem
25 here.

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1 THE COURT: Let's stop there. I understand that you
2 have a dispute, that your client and the defendants have a
3 dispute about the lack of consent. And I also understand that,
4 I think, you both agree that this matter should be arbitrated
5 and not litigated.

6 And so, the only question I'm trying to deal with is,
7 is this money going to disappear somewhere such that I have to
8 keep in place the restraining order. And there is also the
9 serious question of whether Blueprint will be able to conduct
10 its business. In fact, it looks like it would be impossible
11 for Blueprint to conduct its business if its bank accounts are
12 frozen.

13 What about that?

14 MR. REID: Let me address that. To your first point,
15 I don't think there is a dispute that my client was given
16 consent. There's a lot of facts here that we can agree on. I
17 think the question is just going to be whether or not that
18 violates the concept of self-dealing in Delaware. Whether or
19 not it violates the operating agreement which says you cannot
20 have a relationship with another company in which you had a
21 financial interest. And that you cannot solicit any party that
22 the company has a relationship with, and that would include
23 advertisers.

24 Souvah is using the network established by Blueprint,
25 the contacts established by Blueprint to profit themselves at

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1 the expense of the company. Now, so I think in terms of a
2 likelihood of success I think --

3 THE COURT: Likelihood of success on what? The claims
4 that you are talking about aren't claims that are pleaded in
5 the complaint. They are the underlying claims that you would
6 bring to arbitration. The only thing that's really in the
7 complaint is your request for injunctive relief, so I guess I'm
8 switching to the other element of preliminary injunction.

9 So there is the likelihood of success on the merits.
10 It is not clear to me what that means in this context where
11 there aren't really claims. There is also the very important
12 question of irreparable harm. And given what we know, why
13 should I think that you can't just resolve this by arbitration
14 and one side or the other will get damages?

15 MR. REID: Right. So, I have a proposal to that.
16 When we first uncovered this a few weeks ago, when I came to
17 you last week, my main concern was the dissipation of the
18 funds, and it was my recommendation to my client we should
19 freeze the accounts, because we weren't sure what level of
20 nefariousness this reached.

21 Now that the Court is involved, and now that Mr. Cohen
22 is involved, I am more satisfied or at least less concerned
23 about dissipation.

24 What I would propose, and what I proposed to
25 Mr. Cohen, and we've talked as well since Tuesday and I think

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1 we're going to have a good relationship in this case. Is that
2 there are two parts to the injunction: One, that the records
3 and the assets not be disposed, and I would argue that should
4 still remain in force. I don't think -- that should remain.
5 The second part is the assets should be frozen. And I would be
6 willing to unfreeze the bank account, but with an order from
7 the Court that there should be no transactions to any entity in
8 which any of the members have a financial interest. That's
9 clear in the company agreement, and that would at least assuage
10 my client's concerns that more money is going to be taken out
11 to this Souvah.

12 And so, that would be my proposal to really narrow the
13 order so that the company can continue, but I think it is in
14 everybody's interest that the company does continue. It is
15 profitable.

16 THE COURT: I'm not sure how that's really realistic,
17 though. Because it means money can come in from the
18 advertisers, but it means the publishers, if it's Souvah,
19 doesn't get paid, right?

20 MR. REID: Well, this is where the dispute is. We
21 don't see any basis for Souvah to be allowed to be paid. This
22 case is going to come down to --

23 THE COURT: Souvah is providing the lion's share of
24 the business to Blueprint.

25 MR. REID: If they had requested, if they disclosed

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1 that and got the consent, there would be no issue.

2 THE COURT: I understand, and you can fight about that
3 in arbitration. Well, okay. Let me hear from Mr. Cohen.

4 MR. COHEN: Your Honor, as I put in my papers, I don't
5 think there is any way plaintiff can sustain the very difficult
6 burden it has to entitle itself to this extraordinary relief.
7 In the first instance, the plaintiff has unclean hands. We've
8 put that in a sworn declaration of my clients about his failure
9 to abide by the very agreement he looks to enforce.

10 Even with the benefit of filing a supplemental
11 affidavit after I filed my opposition papers, and even after
12 filing the first amended complaint, nowhere is there any
13 pleading that, oh, yes, I have worked at least half my time in
14 the past four years as the contract requires me to towards this
15 business. On the contrary, he hasn't responded to it, which is
16 somewhat remarkable.

17 Moreover, as we all know, a preliminary injunction is
18 there to maintain the status quo pending the ultimate
19 disposition of the merits.

20 THE COURT: In this case asking for the assets to be
21 frozen was more than just maintaining the status quo.

22 MR. COHEN: Of course. That's the point I am making.
23 This is much further than that.

24 THE COURT: Yes.

25 MR. COHEN: And on the contrary, it's flipped the

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1 status quo. Status quo has been we'll continue to do business,
2 Souvah is the lead publisher for Blueprint, Souvah --

3 THE COURT: I understand that. And that's why it's in
4 effect asking for a mandatory injunction to change the status
5 quo.

6 MR. COHEN: Exactly.

7 THE COURT: And that's why the standard is the higher
8 standard.

9 MR. COHEN: Precisely. That's the point I was going
10 to make.

11 One other point, which I didn't have a chance to make
12 in my briefing but I want to raise it here, is the plaintiff
13 didn't even characterize this as a prejudgment attachment which
14 is what it is. And that brings the question of Federal Rule
15 64. Federal Rule 64 brings the question the governing state
16 law. Under CPLR 6201, there is a very high burden there for a
17 plaintiff to get a prejudgment attachment, as the Court knows.
18 And one of the conditions are, in addition to likelihood of
19 success on the merits, is to prove that the defendants are out
20 of state. And that's not the case here. Mr. Soussan is here.
21 He lives in New York, the business of Blueprint is based in --
22 no. The bank account is in Chase, a New York account. So,
23 they don't even address it, and this is an attachment, and the
24 plaintiff cannot comply with the requirements of CPLR 6201 or
25 Rule 64.

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1 THE COURT: Do you agree that this dispute should be
2 resolved in arbitration?

3 MR. COHEN: My answer to that, your Honor, is I'm
4 still -- if we determine that the operating agreement is in
5 effect even though it apparently has not been signed, my answer
6 would be yes. And I may even as a general aside recommend it
7 to my client for this type of dispute.

8 THE COURT: Okay.

9 MR. COHEN: But I don't see any basis --

10 THE COURT: I'm prepared to rule.

11 MR. COHEN: Thank you.

12 THE COURT: Okay. So, let me begin with the standard.
13 The standard has been in place for a long time, but the Second
14 Circuit recently reiterated the standard for preliminary
15 injunction in North American Soccer League, LLC v. United
16 States Soccer Federation, Inc. And that's at 883 F.3d 32 (2d
17 Cir. 2018). The following is a quotation from that case. I'll
18 provide the court reporter with the language just so she
19 doesn't get too upset when I read faster than I should.

20 "Courts refer to preliminary injunctions as
21 prohibitory or mandatory. Prohibitory injunctions maintain the
22 status quo pending resolution of the case; mandatory
23 injunctions alter it. A party seeking a preliminary injunction
24 must show (1) irreparable harm; (2) either a likelihood of
25 success on the merits or both serious questions on the merits

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1 and a balance of hardships decidedly favoring the moving party;
2 and (3) that a preliminary injunction is in the public
3 interest. Because mandatory injunctions disrupt the status
4 quo, a party seeking one must meet a heightened legal standard
5 by showing quote a clear or substantial likelihood of success
6 on the merits.

7 And I have omitted the quotations and citations from
8 the 2018 Second Circuit case, but what I just put in the record
9 is the Second Circuit's language.

10 So, it's clear to me that there are three requirements
11 here then in effect. One is a showing of irreparable harm, two
12 is a clear or substantial likelihood of success on the merits,
13 and three, that the preliminary injunction is in the public
14 interest. And the burden is on the party seeking the relief,
15 in this case the plaintiff.

16 So the procedural posture we are in right now is that
17 I previously entered a TRO, ex parte, in effect doing two
18 things, and that is freezing the bank accounts of the company
19 owned jointly by the plaintiffs and defendants, Blueprint, and
20 also requiring the retention of certain records and assets.
21 And we are here today to determine whether that temporary
22 restraining order should be converted to a preliminary
23 injunction, and for the reasons I will explain, I am dissolving
24 the restraining order. And because the complaint was limited
25 to seeking injunctive relief, I am closing the case because I

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1 will have ruled on everything that is at issue here.

2 Based on counsel's statements here at the conference,
3 the relief sought is narrower than the scope of the original
4 TRO. And that is rather than freezing the bank accounts of
5 Blueprint, plaintiff would ask for an injunction against any
6 transfers of moneys to entities in which the defendants have a
7 financial interest, and in particular, the entity Souvah, LLC,
8 which defendants have described in sworn declarations as a
9 company that does business with Blueprint, that is owned by the
10 two individual defendants, and which acts as a publisher in its
11 business, and is responsible for a significant amount of the
12 business of Blueprint.

13 So that is one request the plaintiff is making, that
14 there not be any transfer of assets to entities in which the
15 defendants have a financial interest. And also that the
16 injunction on disposing of any records or assets be kept in
17 place.

18 So, let me first turn to the question of irreparable
19 harm. I originally granted the TRO because the plaintiff had
20 made at least a plausible showing that the defendants were
21 essentially making secret payments to themselves and
22 essentially stealing money from the company and putting it in
23 their own pockets. And if that were the case, it seems to me
24 there would be a serious question about whether anyone,
25 including the plaintiff, could rely on moneys still being in

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1 place when this matter is resolved.

2 Given that there seems to be a reasonable business
3 explanation for the transfer of funds, that the explanation is
4 based on sworn statements of the individual defendants here, I
5 don't find that the plaintiff has met its burden of showing
6 irreparable harm.

7 With respect to the second element, which has to do
8 with the merits, and a showing of a clear or substantial
9 likelihood of success on the merits, the plaintiff's argument
10 rests primarily on the lack of consent, which is required by a
11 contract that was submitted in connection with the temporary
12 restraining order.

13 Neither party has submitted to me a signed version of
14 the contract, and there seems to be a serious question, even on
15 the part of the parties, as to whether it was signed. And
16 there is also the separate question of whether the contract is
17 in force. It may reflect an oral agreement between the parties
18 or it may be an enforceable contract, notwithstanding that it
19 wasn't signed.

20 In any event, the complaint that is before me does not
21 allege a breach of contract, and it does not allege any other
22 claims for relief, apart from the injunctive relief that I'm
23 addressing now. So it is very hard for me to assess clear or
24 substantial likelihood of success on the merits. And given
25 that, my finding is that the plaintiff has not met the burden

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1 of showing a substantial likelihood of success on the merits.

2 I would also just add that even if the plaintiff were
3 to amend the complaint to add something like a breach of
4 contract claim, it appears that the parties have agreed, but
5 not entirely clear, but perhaps have agreed, that the matter
6 should be arbitrated.

7 But making a preliminary finding, based on what I have
8 seen, I do not find that the plaintiff has shown a clear or
9 substantial likelihood of successes on the merits, even with
10 respect to an underlying claim, but only because that standard
11 is quite high at this stage. So nobody should read into
12 anything I'm saying, an opinion that anyone should rely on in
13 any subsequent merits litigation about the merits.

14 And then with respect to the public interest, I
15 haven't heard any arguments that I find persuasive that having
16 an injunction in place would be in the public interest.

17 I would just note with respect to the retention of
18 records, clearly the defendants are on notice that there is a
19 dispute here, and that it is likely to find its way into
20 litigation or arbitration. I think under those circumstances,
21 there is an independent obligation on the part of the
22 defendants to retain their records. I'm sure Mr. Cohen will
23 cover that with your clients if you haven't already. And so, I
24 will rely on that for the integrity of some future proceeding
25 that relies on the records.

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1 So for all of those reasons, I am vacating the
2 temporary restraining order, denying the application for
3 preliminary injunction, and closing the case. Thank you.

4 MR. COHEN: Thank you, your Honor.

5 (Adjourned)